Office - Supreme Court, U.
FILED
OCT 30 1984
ALEXANDER L. STEVAS
CLERK

# 84-1132

NO.

IN THE SUPREME COURT
OF THE UNITED STATES

---

OCTOBER TERM, 198

---

EASTWAY WOMEN'S CLINIC, INC.,
Petitioner

V.

EASTWAY GENERAL HOSPITAL, LTD.,
Respondent

---

On Writ Of Certiorari
To The United States Supreme Court
From The Fifth Circuit Court Of Appeals

---

## PETITION FOR CERTIORARI

---

OTHA T. CARPENTER
Attorney at Law
609 Fannin, Suite 1200
Houston, Texas 77002
713/225-1261

ATTORNEY FOR PETITIONER

---

LARRY C. JONES
Attorney for the FIRM
FULBRIGHT & JAWORSKI
Southwest Bank Building
Houston, Texas 77002
713/651-5151

ATTORNEY FOR RESPONDENT

---

NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 198

EASTWAY WOMEN'S CLINIC, INC.,

Petitioner

V.

EASTWAY GENERAL HOSPITAL, LTD.,

Respondent

On Writ Of Certiorari
To The United States Supreme Court
From The Fifth Circuit Court Of Appeals

# PETITION FOR CERTIORARI

OTHA T. CARPENTER
Attorney at Law
609 Fannin, Suite 1200
Houston, Texas 77002
713/225-1261

ATTORNEY FOR PETITIONER

LARRY C. JONES
Attorney for the FIRM
FULBRIGHT & JAWORSKI
Southwest Bank Building
Houston, Texas 77002
713/651-5151

ATTORNEY FOR RESPONDENT

## QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals affirmance of the district court's discretion in its imposition of sanctions has so departed from the accepted and usual course of judicial proceedings as to amount to a deprivation of property without due process when the lower court failed to give consideration to a second professional discipline of the petitioner prior to striking defenses, awarding attorney's fees and entering a permanent injuction depriving the petitioner from its corporate name?

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED FOR REVIEW..... | i |
| TABLE OF CONTENTS..... | ii |
| TABLE OF AUTHORITIES..... | iii |
| STATUTE..... | iii |
| PETITION FOR A WRIT OF CERTIORARI..... | 1 |
| OPINIONS BELOW ..... | 1-2 |
| JURISDICTION ..... | 3 |
| STATEMENT OF CASE..... | 4-9 |
| REASON FOR GRANTING WRIT ..... | 10-14 |
| APPENDIX..... | (Attached) |

## TABLE OF AUTHORITIES

Deauville v. Tchitcherine, 173 F.2d 745 (5th Cir. 1949)..... 14

Eastway v. Eastway, 737 F.2d 503, (5th Cir. 1984)..... 8

S.A. v. Rogers, 357 U.S. 197, 78 S.Ct. 1087 2 L.Ed. 1255 (1958)..... 10

Thomas v. United States, 531 F.2d. 746 (5th Cir. 1976)..... 10

## STATUTE

Federal Rules of Civil Procedure, Rule 37, 28 U.S.C.A.

NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

EASTWAY WOMEN'S CLINIC, INC.,
Petitioner

V.

EASTWAY GENERAL HOSPITAL, LTD.,
Respondent

On Writ Of Certiorari
To The United States Supreme Court
From The Fifth Circuit Court of Appeals

# PETITION FOR CERTIORARI

OTHA T. CARPENTER
Attorney at Law
609 Fannin, Suite 1200
Houston, Texas 77002
713/225-1261

ATTORNEY FOR PETITIONER

LARRY C. JONES
Attorney for the FIRM
FULBRIGHT & JAWORSKI
Southwest Bank Building
Houston, Texas 77002
713/651-5151

ATTORNEY FOR RESPONDENT

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

NO.

EASTWAY WOMEN'S CLINIC, INC.,
Petitioner

V.

EASTWAY GENERAL HOSPITAL, LTD.,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW, Eastway Women's Clinic, the Petitioner herein, and prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on July 30, 1984.

## OPINIONS BELOW

The July 30, 1984 opinion of the United States Court of Appeals for the Fifth Circuit,

whose decision is herein sought to be reviewed is reported at 737 F.2d 503 (5th Cir. 1984) and is reprinted in the Appendix, pp. 6 . The August 31, 1984 order of the United States Court of Appeals denying petitioner's petition for rehearing is included and is reprinted in the Appendix, pp. 1 .

## JURISDICTION

The Final Judgment of the United States Court for the Southern District of Texas, Houston Division was entered on July 15, 1984 (Appendix, pp. 10 ). On August 31, 1984 the United States Court of Appeals issued an order denying petitioner's petition for rehearing (Appendix, pp. 1 ). The jurisdiction of the Supreme Court is invoked under 28 U.S.C.§1254.

## STATEMENT OF THE CASE

This petition is precipitated by an appeal from a final judgment and order of the United States District Court for the Southern District of Texas in its imposition of sanctions under the Federal Rules of Civil Procedure 37; striking the defenses and entry of an adverse judgment on the merits; awarding attorney's fees; and the granting of a permanent injunction in favor of Eastway General Hospital, Ltd. (Plaintiff-Appellant) enjoining Eastway Women's Clinic, Inc. from use of its state created corporate name.

The jurisdiction of the lower federal court was invoked pursuant to 28 U.S.C.§1338(a) a civil action arising under the trademark and unfair competition, the Landmark Trademark Act of 1946, 15 U.S.C.§§1050-1127; 15 U.S.C.§1121; 28 U.S.C.§1331; 28 U.S.C.§1337 and pendent jurisdiction.

Eastway General Hospital, Ltd., a Texas limited partnership doing business as Eastway General Hospital filed suit on or about May 18,

1983, against Eastway Women's Clinic, Inc., a Texas corporation who operated an abortion clinic near the hospital's business. (ROA pg. 174)[1] The hospital additionally filed a motion for preliminary injunction seeking to enjoin the Clinic from use of its name EASTWAY WOMEN'S CLINIC, INC., and a motion for leave to take early discovery (ROA 168-173). On or about May 24, 1983, the hospital filed its first request for production of documents and things (ROA 157), and on May 26, 1983, filed its request for admissions and interrogatories (ROA 140).

During the month of June 1983, the hospital filed its notice to take the deposition of a designated witness under Rule 30(b)(6), Federal Rules of Civil Procedure and of the Clinic's administrator (ROA 119, 122). Also, during the month of June 1983, the Clinic filed its answer denying the allegations in the complaint (ROA 110). On or about June 23,

---

1/ "ROA" refers to the federal record on appeal

1983, the Clinic was ordered to obtain new counsel.

After obtaining new counsel during the month of July, 1983, the Clinic filed its response to the hospital's request for production of documents and things (ROA 61). Further, on or about July 6, 1983 an agreed order regarding the schedules of deposition was filed modifying the previous deposition schedules (ROA 59). The modified order extended the discovery date and set the deposition of Dr. Tommy E. Swate, a licensed physician and licensed attorney, for July 7, 1983 at 1:30p.m. and the deposition of Thelma Babineaux, the Clinic's supervisory employee for July 8, 1983 at 10:00a.m. The Hospital's Rule 30(b)(6) designee was to commence July 13, 1983 at 1:30p.m. The modified order did not mention any specified time for document production.

On July 7, 1983, Dr. Swate appeared for his deposition and was deposed in excess of three and one-half hours by the hospital's attorney. During the late evening hours of the scheduled deposition, the hospital's

attorney began requesting documents which consisted primarily of the Clinic's Articles of Incorporation. Although the Hospital's counsel was informed that the requested items would be provided, he insisted on continuing the deposition. On the very next day, July 8, 1983, the Clinic's counsel was contacted by the court by telephonic conference and upon the request of the Hospital's counsel, the court indicated on that Friday, that Dr. Swate's deposition was to continue July 12, 1983, at 9:00a.m. The Clinic's counsel not being able to immediately contact Dr. Swate, filed a motion for a continuation of Dr. Swate's deposition to July 14, 1983 (ROA 56, 57). As a result of the filing of the above-mentioned motion and as the result of two previously scheduled surgeries, Dr. Swate did not attend the July 12, 1983 continuation of his deposition.

Upon Dr. Swate's failure to attend, the Hospital's counsel immediately proceeded to the chambers of the federal judge and the Clinic's counsel was contacted by the court's clerk by phone and asked to immediately come to court

for an in-chambers conference at or about 10:40 a.m. on July 12, 1983. Prior to entering the judge's chamber, the Clinic's counsel attempted to hand deliver the requested documents to the Hospital's counsel, but they were refused. (This fact was admitted by Hospital's counsel during oral argument in the Fifth Circuit). Despite a request for a formal hearing in order for Dr. Swate's reasons for non-appearance to be brought before the court regarding the nature of the surgeries performed, the district court struck the Clinic's defenses; awarded $1,000.00 in attorney's fees; enjoined the Clinic from use of its name (Eastway Women's Clinic, Inc.); and entered a permanent injunction in favor of the Hospital. Thereafter, the Clinic appealed.

The Honorable District Court mistates significant facts in its opinion. Eastway v. Eastway, 737 F.2d 503, 504 (5th Cir. 1984). The court indicates that the Hospital's counsel filed a second motion to compel discovery and for sanctions. There was no second motion

filed or received by the Clinic's counsel. After the non-appearance of Thelma Babineaux on that day, the Hospital's counsel requested sanctions from the court ex parte. Further, the Clinic never received any formal notices from the court regarding the July 8, 1983 and July 12, 1983 hearings on conferences.

## ARGUMENT AND REASON FOR GRANTING WRIT

A. THE FIFTH CIRCUIT COURT OF APPEALS HAS SO SANCTIONED AND DEPARTED FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO UNJUSTIFIABLY DEPRIVE THE CORPORATE CLINIC OF ITS STATE CREATED PROPERTY RIGHT TO ITS CORPORATE NAME WITHOUT DUE PROCESS OF THE LAW.

Federal courts have always been concerned, that the severe sanction of dismissal should never be utilized when it has been established that any failure to comply with discovery has been due to inablility of the non-complying party and not willfulness. S.A. v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed. 1255 (1958). Additionally, federal courts have long recognized the necessity for due process regarding the imposition of sanctions and the deprivation of property rights. Thomas v. United States, 531 F.2d. 746 (5th Cir. 1976). Accordingly, an individual or corporation should be afforded no less standards when they are engaged in legal activity that is abhorred by a large percentage of the populus. Hence, a federal court should not exercise its discretion to unduly penalize an individual or corporation simply

because they are engaged in an unpopular activity (i.e. abortion clinic). To the extent that this Honorable United States Supreme Court has declared the activity of abortions legal, then a clinic has the right to incorporate and legally perform the activity at the same time the corporate clinic has the right to protect its corporate name and expect equal treatment from the courts in the application of discovery sanctions pursuant to Rule 37 of the Federal Rules of Civil Procedure. If in fact the activity of abortions is to be declared illegal, then it should not be done by a district court utilizing the Federal Rules of Civil Procedure as a pretext to quash the activity. The United States Supreme Court or the United States Congress would be more of an appropriate forum.

Although the Hospital cited numerous cases where dismissal was appropriate, a common thread distinguishes those cases in terms of the time of compliance afforded by the court prior to imposing the drastic sanction of dismissal.

In the present case, the Clinic was afforded very little time to comply and was in fact making efforts to comply with the discovery requests. However, the courts tend to rationalize the impositions of severe sanctions in this case, because of the fact that the Clinic's Rule 30(b)(6) designee is also an attorney and a physician. Hence, the courts systematically imputes a standard of wilful and contumacious non-compliance to the Clinic to justify its impositions of the drastic sanction of dismissal without any formal hearings.

This country has never been one to penalize an individual for obtaining two professional disciplines. On the contrary, if a person has enough fortitude to persevere, strive, endure and obtain an additional professional discipline, then commendation would be more appropriate.

The courts below draws the conclusion that Dr. Swate the Clinic's Rule 30(b)(6) designee, is better suited and fitted for an attorney's hat. Accordingly, the courts separate his other main profession as an obstetri-

cian and gynecologist. Thus, the courts fail to focus on the nature of the scheduled surgeries Dr. Swate had to perform prior to the continuation of his deposition. Thus, the district court concluded that there was no need for a hearing to elicit any sworn testimony regarding the nature of Dr. Swate's surgical activities. There was no testimony to ascertain whether the surgeries encompassed a Vacuum Asperation which occurs during the first trimester of pregnancy or to determine whether they were of the nature of a Hypertonic Saline Abortion or Hysterotomy which occurs in the latter stages of pregnancy. The courts to the contrary viewed Dr. Swate as an attorney and imposed a higher standard to measuring his compliance with Rule 37 of the Federal Rules of Civil Procedure. It is totally unrealistic for the courts to look at one of Dr. Swate's professional disciplines as an attorney without balancing it with his other professional discipline as a physician.

As the result of the narrower view of the courts, the Corporate Clinic lost access to its

state created corporate name without any procedural due process or necessary hearing. The Clinic should have been afforded a formal hearing prior to the imposition of such drastic sanctions inasmuch as the requested documents were tendered to, but not received by the Hospital's counsel. Deauville Associates, Inc. v. Eristavi-Tchitcherine, 173 F.2d 745 (5th Cir. 1949).

## CONCLUSION

WHEREFORE, Petitioner pray that a writ of certiorari be granted.

Respectfully submitted,

Otha T. Carpenter

Otha T. Carpenter

Attorney for Petitioner